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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

12 UNITED STATES OF AMERICA,	)	No.: CR 05-0672 MHP
	)	
13 Plaintiff,	)	
	)	ORDER OF DETENTION
14 v.	)	PENDING TRIAL
	)	
15 DAVID HENDERSON,	)	
	)	
16 Defendant.	)	
17	)	

18 This matter came before the Court on November 22, 29, and 30, 2005 for detention  
19 hearings. Defendant David Henderson was present and represented by Chief Assistant Federal  
20 Public Defender Geoffrey Hanson. Assistant United States Attorney Robert David Rees  
21 appeared for the United States of America.

22 Pretrial Services submitted a report to the Court and the parties that recommended  
23 detention, and a representative of Pretrial Services was present at the hearings. The government  
24 requested detention, and Defendant opposed. Proffers, exhibits, and arguments affecting  
25 detention were submitted by the parties at the hearings.

26 Upon consideration of the facts, exhibits, proffers, and arguments presented, the Court

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1 finds by a preponderance of the evidence that although there are conditions under which release  
2 could reasonably assure the appearance of Defendant upon release, those conditions (*i.e.*, a  
3 viable surety) have not been met here. Accordingly, the Court concludes that Defendant must be  
4 detained pending trial in this matter, unless and until those conditions can be satisfied.

5 The present order supplements the Court's findings at the detention hearing and serves as  
6 a written findings of fact and statement of reasons as required by 18 U.S.C. § 3142(i)(1).

7 At the outset, the Court rejects Defendant's argument that he has a Sixth Amendment  
8 right under *Crawford v. Washington*, 541 U.S. 36 (2004) to call and cross-examine prosecution  
9 witnesses in a detention hearing and that the government cannot proceed by proffer. No court  
10 has held a detention hearing is a "criminal prosecution" to which the Sixth Amendment applies.  
11 *Cf. U.S. v. Hall*, 419 F.3d 980 (9th Cir. 2005) (Sixth Amendment does not apply to revocation  
12 hearing on supervised release), *U.S. v. Winsor*, 785 F.2d 755 (9th Cir. 1986) (defendant has no  
13 right to cross-examine adverse witnesses not called to testify in detention hearing). *See U.S. v.*  
14 *Salerno*, 481 U.S. 739 (1987) (emphasizing regulatory aspect of pre-trial detention). On the  
15 other hand, due process does apply. Under some circumstances (*e.g.* where the government's  
16 argument for detention is based on evidence of questionable reliability and there is not good  
17 reason not to present the witness for examination) a defendant may be entitled to cross-examine  
18 adverse witness(es) as a matter of due process. *See U.S. v. Comito*, 177 F.3d 1166 (9th Cir.  
19 1999); *Winsor*, 785 F.2d at 757 (implying that if there is a proper proffer, defendant may have  
20 right to cross-examine investigator and police officers). However, because the Court relies  
21 herein on relatively undisputed evidence about the alleged offense, Defendant's circumstances  
22 and criminal history, it concludes cross-examination would have little utility here and is not  
23 mandated by due process.

24 The Bail Reform Act of 1984, 18 U.S.C. §§ 3141–50, sets forth four factors which the  
25 Court must consider in determining whether pretrial detention is warranted. These factors are:

26 (1) the nature and circumstances of the offense charged (§ 3142(g)(1));

1 (2) the weight of the evidence against the person (§ 3142(g)(2));

2 (3) the history and characteristics of the person including, among other  
3 considerations, character, employment, family, and past conduct and criminal  
4 history (§ 3142(g)(3)); and

5 (4) the nature and seriousness of the danger to any person or the community that  
6 would be posed by the person's release (§ 3142(g)(4)).

7 With regard to the first factor, the nature and circumstances of the offense charged,  
8 Defendant is accused of unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).  
9 The Court takes notice of the transcript of a preliminary hearing in San Mateo County which  
10 outlines the underlying facts of the present charge. According to the transcript, Defendant David  
11 Henderson was arrested at the scene of a break-in at a gun store on June 10, 2005. A car  
12 registered to Defendant had been driven through the front windows and wall of the store, and  
13 two 12-gauge shotguns had been loaded inside the store. Police also found evidence indicating  
14 that several shotgun rounds were discharged in the store. Upon his arrest, Defendant tested  
15 positive for cocaine. While Defendant would prefer a more extensive cross-examination of the  
16 officers on the scene, these facts do not appear to be seriously in dispute.

17 The second factor, the weight of the evidence, is considered the least important of the  
18 factors. The Bail Reform Act neither requires nor permits a pretrial determination of guilt.  
19 *United States v. Gebro*, 948 F.2d 1118, 1121–22 (9th Cir. 1991). However, the weight of the  
20 evidence, which is entitled to some consideration, appears strong. It appears undisputed that  
21 Defendant crashed his car into the gun store, exercised dominion and control over at least one  
22 firearm and caused it to fire more than once.

23 The Court further finds that the third factor, the history and characteristics of the  
24 defendant, militate against the defendant and in favor of detention. The Pretrial Services Report  
25 confirms the defendant has an extensive criminal history. Defendant has suffered numerous  
26 convictions, including three separate felonies and five misdemeanors. A number of these

1 convictions occurred while Defendant was on probation for a prior offense, and indicate a failure  
2 to adhere to court orders and rules.

3 Defendant's criminal history and the Pretrial Services Report also reveals that seven  
4 bench warrants have been issued against Defendant. To be sure, Defendant has raised  
5 substantial questions about whether some of those warrants were for reasons other than failures  
6 to appear or were mitigated, but in at least one instance, the failure to appear resulted in  
7 revocation of bail.

8 Defendant's record indicates that he is not generally amenable to supervision. Defendant  
9 has violated his probation several times, and his background does not indicate the kind of  
10 reliability that would reasonably assure the Defendant's appearance, at least under the conditions  
11 of state court supervision to which he has been subjected.

12 As to his ties to the community, Defendant has provided no available individual to act as  
13 a bond surety or custodian. No one has appeared in court, provided a letter of support, or made  
14 themselves available for pre-trial interview.

15 With respect to the fourth factor, the nature and seriousness of the danger to the  
16 community, the Court does not believe that the government has proven by clear and convincing  
17 evidence that Defendant poses any such danger that cannot be met by a combination of  
18 conditions.

19 Notwithstanding the foregoing, the Court notes that most of the prior offenses are related  
20 to drugs or property crimes (*e.g.* burglary, hit and run) and that despite prior probation  
21 violations, he did successfully complete diversion in 2004. Accordingly, despite prior  
22 transgressions of court supervision and bench warrants, the Court is prepared to accept  
23 Defendant's proffered condition of release to a half-way house, if he can demonstrate some  
24 degree of community support. However, as noted above, he has not been able to garner any  
25 person willing to step forward and vouch for him, even though he has relatives in the local area  
26 and has lived and worked here for years. It appears, therefore, he has no real ties to this

1 community and no support. If he can produce someone who will vouch for him, the Court will  
2 release him to a half-way house.

3 Accordingly, based on all of the evidence above, the Court finds by a preponderance of  
4 the evidence that no presently available condition or combination of conditions of release will  
5 reasonably assure the appearance of Defendant as required. The Court is open to reconsideration  
6 as stated herein.


7  
8 Pursuant to 18 U.S.C. § 3142(i), IT IS ORDERED THAT:

9 (1) the Defendant be, and hereby is, committed to the custody of the Attorney  
10 General for confinement in a corrections facility separate, to the extent  
11 practicable, from persons awaiting or serving sentences or being held in custody  
12 pending appeal;

13 (2) the Defendant be afforded reasonable opportunity for private consultation with  
14 his counsel; and

15 (3) on order of a court of the United States or on request of an attorney for the  
16 government, the person in charge of the corrections facility in which the  
17 Defendant is confined shall deliver the defendant to an authorized Deputy United  
18 States Marshal for the purpose of any appearance in connection with a court  
19 proceeding.

20  
21 Dated: December 9, 2005

22   
23 EDWARD M. CHEN  
24 United States Magistrate Judge  
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